SUPREME COURT, U.S.

No. 1311

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In the Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA, APPELLANT

v.

ARNOLD HABIG AND JEROME SCHROERING

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court (App. A. *infra*, pp. 8–11) is not reported.

JURISDICTION

The order of the district court dismissing Counts 4 and 6 of the indictment was entered on January 23, 1967 (App. *infra*, p. 11). Notices of appeal to this Court were filed in the district court on February 20 and 21, 1967. The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment or counts thereof on the ground of the statute of limitations is conferred by 18 U.S.C. 3731. *United States* v. *Barber*, 219 U.S. 72; *United States* v. *Goldman*, 277 U.S. 229, 236–237.

259-994—67

QUESTION PRESENTED

Under the Internal Revenue Code certain corporate income tax returns were due for filing on May 15, 1960, but the corporations obtained extensions of time to August 15, 1960. The returns were filed on August 12 and 15, 1960. The question presented is whether the six-year statute of limitations on tax evasion and other crimes relating to the filing of false tax returns began to run when the returns were filed (August 12 and 15, 1960) or when the returns would have been due had there been no extensions of time (May 15, 1960).

STATUTES INVOLVED

The relevant portions of the Internal Revenue Code of 1954, §§ 6513 and 6531, are set forth in Appendix B, *infra,* pp. 12–13.

STATEMENT

Appellees were officers or employees of Gordonsville Manufacturing Company and W. W. Kimball Company. Both corporations reported their income on a fiscal tax year ending February 29, 1960; their income tax returns were thus due on May 15, 1960. Both corporations obtained from the government 90-day extensions of time for filing their returns to August 15, 1960. Kimball Company filed its return on August 12, 1960, and Gordonsville filed on August 15, 1960.

Appellees were indicted, *inter alia,* for violation of 1954 Code § 7201 (attempted evasion of tax) by filing a false corporate tax return for Gordonsville on August 15, 1960 (Count 4), and for violation of 1954

Code § 7206(2) (wilfully aiding in the preparation and presentation of a false return) by aiding in the preparation and presentation of a false corporate tax return for Kimball filed on August 12, 1960 (Count 6). The indictment was returned on August 12, 1966, within six years after the filing of the two allegedly false returns (August 12 and 15, 1960) but more than six years from the date prescribed by the Code for their filing, not counting extensions (May 15, 1960). The government contended that the offenses were committed when the false returns were filed, so that the six-year statute of limitations had not run when the indictment was returned. The district court dismissed both Counts 4 and 6 on the ground of limitations. (App. *infra*, pp. 8–11.)

THE QUESTION IS SUBSTANTIAL

This case presents a significant procedural question in the enforcement of the criminal provisions of the Internal Revenue Code.

1. Section 6531 of the Code (App. *infra*, pp. 12–13) provides that criminal proceedings such as these must be instituted within six years "next after the commission of the offense." Absent further relevant statutory language, the offense of attempted tax evasion as well as the offense of aiding in the presentation of a false return is committeed at the time that the false return is filed.[1] However, § 6531 goes on to pro-

[1] See *Cave* v. *United States*, 159 F. 2d 464 (C.A. 8), certiorari denied, 331 U.S. 847; *United States* v. *Croessant*, 178 F. 2d 96 (C.A. 3), certiorari denied, 339 U.S. 927; *United States* v. *Yeoman-Henderson, Inc.*, 193 F. 2d 867, 869 (C.A. 7); *Myres* v. *United States*, 174 F. 2d 329, 334 (C.A. 8), certiorari denied, 338 U.S. 849; *Benham* v. *United States*, 215

vide that "[f]or the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable." Section 6513(a) (App. *infra*, p. 12) provides that "any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day," and that "[f]or purposes of this subsection, the last day prescribed for filing the return * * * shall be determined without regard to any extension of time granted the taxpayer."

Section 6513(a), which is captioned "Early Return," was meant to apply where a taxpayer filed his return before the due date specified in the Code. In such a case the return would be treated as filed on the due date. Thus no taxpayer can shorten the statute of limitations by filing his return earlier than required by the Code, and the government can always be sure that the six-year statute does not run on an offense until at least six years after the false return was originally due, regardless of whether the taxpayer filed it early. If, for example, the two corporate returns here in question (which were originally due May 15, 1960) had been filed on April 15, 1960, § 6513(a) would have caused the six-year statute of limitations to begin running not on April 15, 1960, but on May 15, 1960.

F. 2d 472, 473 (C.A. 5); *Swallow* v. *United States*, 307 F. 2d 81, 83 (C.A. 10), certiorari denied, 371 U.S. 950; *Hayes* v. *United States*, 227 F. 2d 540, 542 (C.A. 10); *Butzman* v. *United States*, 205 F. 2d 343, 350–351 (C.A. 6), certiorari denied, 346 U.S. 828; *Guzik* v. *United States*, 54 F. 2d 618, 619 (C.A. 7), certiorari denied, 285 U.S. 545; *Bowles* v. *United States*, 73 F. 2d 772, 774 (C.A. 4).

However, the section has no application to returns which are filed after the due date specified in the Code. If the two corporations here in question, after obtaining 90-day extensions until August 15, 1960, had filed their returns on June 1, 1960, § 6513(a) would not have been applicable because the returns would not have been "filed before the last day prescribed for the filing thereof * * * determined without regard to any extension of time granted the taxpayer." Thus, the offenses would have been committed on June 1, 1960—the day the returns were filed—and the statute of limitations would have begun to run at that time.

The legislative history of § 6513(a) and its predecessor, which was first enacted in 1942,[2] confirms this construction. The 1942 committee reports state that "This provision does not apply to taxpayers who are given the benefit of an extension of time in which to file their returns, and [who] file the return before the last day of the extended period." H. Rep. No. 2333, 77th Cong., 2d Sess., p. 119; S. Rep. No. 1931, 77th Cong., 2d Sess., p. 156.[3]

Nevertheless, the district court construed § 6513(a) as providing that the offenses specified in § 6531 are

[2] 1939 Code § 322(b)(4), added by Act of October 21, 1942, Ch. 619, § 169(a)(4), 56 Stat. 877.

[3] When § 6513(a)'s predecessor was first enacted in 1942 it (§ 6513(a)) extended "the existing income-tax [refund] rule as to early returns" "to all other taxes" (H. Rep. No. 1337, 83d Cong., 2d Sess., p. A 416; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 587) and to criminal prosecutions. 1954 Code § 6531.

applied only to the statute of limitations on civil income tax refund cases, 1939 Code § 322(b)(4). The 1954 Code

committed on the date prescribed by the Code for filing the return, even where, as here, the return is not filed before that date. The district court thus held that the offenses in the instant case were committed on May 15, 1960, so that the August 12, 1966, indictment was untimely.

Such a construction of § 6513(a) produces the absurd result that the statute of limitations on an offense involving the *filing* of a false return begins to run before the offense has been committed, *i.e.*, before the return has been filed. The language, the purpose, and the legislative history of the section clearly demonstrate that it was meant to apply only to an "Early Return," *i.e.*, one which was "filed before the last day prescribed for the filing thereof * * * determined without regard to any extension of time granted the taxpayer" (1954 Code § 6513(a)) and that it was not meant to apply where the taxpayer obtained "an extension of time in which to file [his] returns." H. Rep. No. 2333, *supra;* S. Rep. No. 1631, *supra.*

2. The lower court decisions are in conflict on this question. The district court in the instant case and the Fifth Circuit in *Hull* v. *United States,* 356 F. 2d 919, have held that § 6513(a) applies to returns which are filed *after* the original due date prescribed by the Code; one other district court in *United States* v. *Hensley,* 257 F. Supp. 987 (D. N.M.), in a well reasoned opinion, reached the result urged here by the government. The question presented is a recurring one—the problem is present in 10 to 20 cases a year—and the issue should be resolved by this Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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APRIL 1967.

APPENDIX A

United States District Court, Southern District of Indiana, Indianapolis Division

No. IP 66–Cr–138

UNITED STATES OF AMERICA

v.

ARNOLD F. HABIG
JEROME M. SCHROERING

Entry

The above entitled action came before the Court for ruling on defendants' Motion to Dismiss Counts IV and VI of Indictment and brief in support thereof filed October 28, 1966, the government's memorandum in opposition thereto filed November 8, 1966, plaintiff's reply brief filed November 28, 1966, Stipulation of Facts filed December 27, 1966, and the government's and defendants' waiver of an evidentiary hearing and argument filed January 13, 1967. The Court being duly advised in the matter now finds:

1. That Count IV of the indictment charges that on or about August 15, 1960 the defendants filed and caused to be filed a false and fraudulent tax return on behalf of Gordonsville Manufacturing Company Inc.

2. That Count VI of the indictment charges that on or about August 12, 1960 the defendants did willfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation of a false and fraudulent tax return on behalf of W. W. Kimball Company.

3. That the companies on whose behalf the fraudulent tax returns were allegedly filed had fiscal taxable years ending on the last day of the month of February 1960.

4. That the prescribed date for filing the tax returns allegedly filed by the defendants on behalf of Gordonsville Manufacturing Company Inc. and W. W. Kimball Company was May 15, 1960.

5. That the Gordonsville Manufacturing Company Inc. received a three month extension for the filing of its tax return on May 16, 1960 by filing an application therefore with the Director of Internal Revenue, Indianapolis, Indiana, on May 16, 1960, and that the W. W. Kimball Company received a three month extension for the filing of its tax return on May 9, 1960 by filing an application therefore with the District of Internal Revenue, Chicago, on May 9, 1960.

6. That the tax return allegedly filed by the defendants on behalf of Gordonsville Manufacturing Company Inc. was filed with the Director of Internal Revenue, Indianapolis, Indiana, August 15, 1960, and that the tax return allegedly procured by the defendants on behalf of W. W. Kimball Company was filed with the District Director of Internal Revenue, Chicago, Illinois, on August 12, 1960.

7. That the indictment in this action was returned August 12, 1966.

IT IS THEREFORE ORDERED AND ADJUDGED that the defendants' Motion to Dismiss Counts IV and VI of Indictment is SUSTAINED and that Counts IV and VI of the indictment be and are hereby dismissed. The period of limitations for the offenses charged in Counts IV and VI of the indictment is six (6) years. Title 26 U.S.C.A. Section 6531. For the purpose of determining the period of limitation on criminal prosecutions, the rules of Section 6513 are applicable Title

26 U.S.C.A. Section 6531. Title 26 U.S.C.A. Section 6513 states that "For the purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer * * *". Therefore, the question presented by the Motion to Dismiss is whether the indictment in Counts IV and VI was returned beyond the period of limitations. If the returns in question are deemed to be filed on the date they were actually received, then the indictment on Counts IV and VI is not defective, for it was returned within the six (6) year period of limitations from those dates. However, such a construction is unacceptable in light of the statutory authority quoted above. The statutory mandate is clear—for the purpose of criminal prosecutions, the last day prescribed for filing shall be determined without regard to any extension of time granted the taxpayer. The last day prescribed for filing the returns in question was May 15, 1960 and the indictment was returned August 12, 1966 which is clearly beyond the six (6) year statute of limitations. The government has proposed the theory that a taxpayer who is given the benefit of an extension of time acquires a new due date. Even if this were so, it would not remedy the defect in Count IV of the indictment, for Gordonsville Manufacturing Company Inc. did not receive an extension until May 16, 1960. The statute of limitations necessarily began to run on the original due date of May 15, 1960. The Court cannot, in any case, accept the government's construction of Section 6513 for it is based upon a consideration of sections concerning civil claims for credits or refunds of which it is admittedly a part. However, Congress by Section 6531 for the sole purpose of determining the period of limitations in criminal prosecutions adopted only Section 6513. This

Congress had a right to do. The statute is not ambiguous, and therefore leaves no room for construction. As was stated in *Hull v. United States,* 356 F.2d 919 (5th Cir. 1966), "The statute seems clear to the effect that returns are deemed to have been filed and wilfull acts of (sic) omissions committed on the last date prescribed for the filing of returns irrespective of extensions of time granted * * *". Judge Steckler, Chief Judge of this Court, in the case of United States v. Sheety, 224 F.Supp. 789 (S.D.Ind. 1963) made a similar finding. In that case the Court construed Section 6531 and Section 6513(a) and held that the date of the offense is considered to be the date prescribed for filing. The Court went on to say that it considered itself bound "by the clear language" of the statutes. This Court can find no reason to deviate from that construction.

Dated this 23 day of January, 1967.

CALE J. HOLDER,

Cale J. Holder, Judge, United States District Court, Southern District of Indiana.

APPENDIX B

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6513. TIME RETURN DEEMED FILED AND TAX CONSIDERED PAID

(a) *Early Return or Advance Payment of Tax.*—For purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. For purposes of section 6511 (b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments.

* * * * *

Section 6531. PERIODS OF LIMITATION ON CRIMINAL PROSECUTIONS.

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years.

* * * * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any

matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim or document * * *

* * * * *

* * * For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable.

U.S. GOVERNMENT PRINTING OFFICE: 1967